Comment on Recent Cases

ADVERSE POSSESSION: PAYMENT OF TAXES: DOUBLE PAYMENT.—A person claiming title by adverse possession in California must show that he has paid all the taxes assessed during the statutory period.[1] But may the payment of taxes by the adverse possessor be subsequent to payment of the same taxes by the holder of the legal title? The California decisions on this matter are not entirely consistent.

The question first arose in 1893 in Cavanaugh v. Jackson.[2] In this case, it was held in a decision of the Supreme Court in department that the adverse possessor fulfilled all conditions of the statute[3] by having the land assessed to him and paying the taxes thereon, and that the number of times the taxes thereon were paid by others was immaterial. The court declined to follow an Illinois case taking the opposite view,[4] claiming that to do so would cause a scramble to the tax-collector's office between the adverse claimant and the legal owner. Justice Harrison, however, though concurring in the result, declared that the taxes having once been paid, the burden was removed, so that there was no longer any tax to be paid; and, as a result, no right could be acquired by the adverse possessor if he paid the taxes subsequent to payment by the holder of the legal title. Four years later in Carpenter v. Lewis[5] the question again arose in the same department and Justice Harrison's view was adopted.

The question again arose in 1907, and the District Court of Appeal after reviewing the two previous decisions of the Supreme Court followed Justice Harrison's view.[6] In 1909 this rule was once more approved by the District Court of Appeal.[7] During the same year, the question was again presented to a department of the Supreme Court in Owsley v. Matson.[8] and after discussing Cavanaugh v. Jackson [9] and Carpenter v. Lewis,[10] the court followed the former decision. Two later decisions of the District

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[1] 1 California Law Review 53.
[2] 99 Cal. 672, 34 Pac. 509.
[3] Cal. Code Civ. Proc., § 325.
[4] Bolden v. Sherman (1882), 101 Ill. 483.
[5] (1897), 119 Cal. 18, 50 Pac. 925.
[6] Commercial National Bank v. Schlitz (1907), 6 Cal. App. 174, 91 Pac. 750.
[7] Glowner v. De Alvarez (1909), 10 Cal. App. 194, 101 Pac. 432.
[8] (1909), 156 Cal. 401, 104 Pac. 983.
[9] Supra, n. 2.
[10] Supra, n. 5.

Court of Appeal[11] followed Owsley v. Matson, and in 1916 it was approved by a bank decision of the Supreme Court in Cummings v. Laughlin[12] which, however, did not consider the point very fully.

But the District Court of Appeal in the recent decision of *Van Calbergh v. Easton*[13] held that the payment of taxes by the adverse possessor after the holder of the legal title had already paid them, did not satisfy the statute. The court attempted to reconcile its decision with Cummings v. Laughlin[14] and Owsley v. Matson[15] on the ground that those cases involved overlapping boundaries, and were for that reason subject to a different rule.

The arguments presented by the District Court of Appeal, however, apply as well to the two cases it attempts to reconcile as to the principal case itself. The lien of the tax was removed by its payment; and the moment it was paid there was no longer a legally assessed tax in existence on the property for that year. The payment by the adverse possessor to the tax-collector after the holder of the legal title had already paid, could not be a payment of taxes, as they had ceased to exist when paid. The first payment of the taxes discharged the lien, and the second was therefore a mere voluntary payment of no legal effect as regards adverse possession.

If it is not admitted that the first payment of taxes discharges the lien in cases of overlapping boundaries, it then must be held that the adverse possessor must pay both taxes, not only those assessed to him, but those assessed to the legal owner as well. The code provides that the adverse possessor must pay all taxes levied and assessed on the property,[16] and if both are considered as valid taxes, both must be paid to comply with the statute.

The argument that the view of the statute as expressed by the principal case will cause a scramble to the tax-collector's office, is, as the court pointed out, an argument against the expediency of the statute, and not a reason for a different interpretation thereof. The principal case is supported by the weight of authority in other states,[17] and it is hoped that the Supreme Court will definitely

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[11] Bell v. Germain (1910), 12 Cal. App. 375, 107 Pac. 630; People's Water Co. v. Lewis (1912), 19 Cal. App. 622, 127 Pac. 506.

[12] (Oct. 21, 1916), 52 Cal. Dec. 481, 160 Pac. 833.

[13] (Feb. 13, 1917), 24 Cal. App. Dec. 320.

[14] Supra, n. 12.

[15] Supra, n. 8.

[16] Supra, n. 3.

[17] Morrison v. Kelly (1859), 22 Ill. 609, 626; Ross v. Coat (1871), 58 Ill. 53; Bolden v. Sherman, supra, n. 4; Maher v. Brown (1899), 183 Ill. 575, 56 N. E. 181; Clayton v. Feig (1900), 188 Ill. 603, 59 N. E. 245; Rio Grande Western Ry. Co. v. Salt Lake Investment Co. (1909), 35 Utah 528, 101 Pac. 586, 591 (approving Carpenter v. Lewis, supra, n. 5); Cramer v. Walker (1913), 23 Idaho 495, 130 Pac. 1002 (approving Carpenter v. Lewis), supra, n. 5. Contra, Thomson v. Weisman (1904), 98 Tex. 170, 82 S. W. 503 (approving Cavanaugh v. Jackson, supra, n. 2).

settle this disputed point in line with reason and authority by approving the holding of the District Court of Appeal for all cases of adverse possession, whether of overlapping boundaries or not.

S. M. A.

BANKRUPTCY: QUALIFIED JUDGMENT AGAINST BANKRUPT: LIABILITY OF SURETY ON BOND TO RELEASE ATTACHMENT ON PROPERTY OF BANKRUPT.—An adjudication and discharge in bankruptcy, when pleaded, is an effectual bar to an action against the bankrupt, provided the claim upon which the action is founded is one provable in the bankruptcy proceeding.[1] To this rule there are a few exceptions which are enumerated in the Act.[2] The discharge, however, will not alter "the liability of a person who is a co-debtor with, or grantor, or in any manner a surety for a bankrupt."[3] But what if the surety conditions his liability upon the recovery of a judgment against the principal obligor?

In *Tormey v. Miller*[4] a bond was given to release an attachment. The liability of the sureties was conditioned upon the recovery of a judgment by the plaintiff. Within four months after the attachment was so released the defendant was adjudicated a bankrupt and was thereafter given his discharge. This discharge the bankrupt set up by way of supplemental answer as a bar to the action. The District Court of Appeal held that the plaintiff was, for the purpose of enforcing the liability of the surety, entitled to a qualified judgment against the defendant with a perpetual stay of execution.

It is well established that where the attachment has been levied more than four months prior to the bankruptcy, it is not invalidated by the adjudication,[5] and a special judgment may be had against the bankrupt in order to enforce the obligation of the sureties.[6] This is obviously correct, for had the attachment been continued it would have been unaffected by bankruptcy, and

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[1] Williams v. U. S. Fidelity Co. (1915), 236 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. Rep. 289; Nelson v. Petterson (1907), 229 Ill. 240, 82 N. E. 229; Wood v. Carr (1903), 115 Ky. 303, 73 S. W. 762; Bankruptcy Act, § 17a, 30 Stats. at L. 544.

[2] Bankruptcy Act, § 17a, subds. 1-4, 30 Stats. at L. 544.

[3] Bankruptcy Act, §16a, 30 Stats. at L. 544; Aliendroth v. Van Dolsen (1888), 131 U. S. 66, 33 L. Ed. 57, 9 Sup. Ct. Rep. 619.

[4] (Sept. 19, 1916), 23 Cal. App. Dec. 429, 160 Pac. 858.

[5] Globe Bank etc. Co. v. Martin (1915), 236 U. S. 288, 59 L. Ed. 583, 35 Sup. Ct. Rep. 377; Bankruptcy Act, § 67, subd. f, 30 Stats. at L. 544.

[6] Hill v. Harding (1888), 130 U. S. 699, 32 L. Ed. 1083, 9 Sup. Ct. Rep. 725; Bank of Commerce v. Elliott (1901), 109 Wis. 648, 85 N. W. 417; U. S. Wind Engine & Pump Co. v. North Penn Iron Co. (1910), 227 Pa. St. 262, 75 Atl. 1094; Smith v. Lacey (1905), 86 Miss. 295, 38 So. 311; Rosenthal v. Nove (1900), 175 Mass. 559, 56 N. E. 884; Holladay v. Hare (1886), 69 Cal. 515, 11 Pac. 28.